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In the Supreme Court of the United States

OCTOBER TERM, 1979

OTIS TRAMMEL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (A. 39-50) is reported at 583 F.2d 1166.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1978. The petition for a writ of certiorari was filed on November 13, 1978, and was granted on February 26, 1979 (A. 51). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant may invoke the privilege against adverse spousal testimony to bar the voluntary testimony of his wife when she was a joint participant in the offense charged.

RULE INVOLVED

Rule 501, Fed. R. Evid., provides in pertinent part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness * * * shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner and two others, Joseph Freeman and Edwin Lee Roberts, were convicted of importing heroin, in violation of 21 U.S.C. 952(a), and conspiring to commit that offense, in violation of 21 U.S.C. 962(a) and 963 (A. 2, 4–7). Petitioner was given an indeterminate sentence pursuant to the Federal Youth Corrections Act, 18 U.S.C. 5010(b) (A. 37).[1] A divided panel of the court of appeals affirmed (A. 39–50).

1. The evidence at trial showed that in 1975 petitioner and his wife Elizabeth lived near co-defendants Freeman and Roberts at Clark Air Force Base in the Philippines (III Tr. 20, 31, 119–120). During

[1] Roberts was sentenced to two years' imprisonment; Freeman received an indeterminate sentence under the Federal Youth Corrections Act.

the time they lived there, the four of them participated with others in a scheme to obtain heroin from Thailand and transport it to the United States by way of the Philippines.

In late August 1975, Elizabeth Trammel flew to Thailand at petitioner's behest to obtain a quantity of heroin. She returned to the Philippines with the heroin and gave it to petitioner. Two days later petitioner and his wife flew to San Francisco, with the heroin secreted on her body, and then proceeded to Los Angeles. There Elizabeth gave the heroin to petitioner and subsequently observed him distribute some of it for further sale (III Tr. 120–127).

On September 13, 1975, co-defendant Freeman flew from the Philippines to California, where he joined petitioner and his wife. The three of them drove to San Bernadino to seek a buyer for the remaining heroin among Freeman's friends. Freeman thereafter went to Virginia to join co-defendant Roberts. Roberts had flown there from the Philippines to retrieve a quantity of heroin that he had arranged to have mailed to him at his parents' address in Portsmouth, Virginia. Roberts assisted Freeman in disposing of petitioner's heroin. Freeman then returned to California, where he gave petitioner $3500. At that time, they discussed plans for petitioner's wife to return to Thailand to obtain an additional supply of heroin (III Tr. 20–22, 127–134).

Elizabeth Trammel flew to the Philippines with Freeman and a few days later embarked for Thailand, where she obtained another quantity of heroin. Upon arriving back in the Philippines, she gave the heroin to Freeman, who returned it to her two days later for transportation to the United States. Freeman instructed her to deliver the heroin to Roberts at Peterson Field Air Force Base in Colorado Springs, and not to give it to petitioner. During a customs search in Hawaii, the heroin was discovered on her person, and she was arrested. She then agreed to cooperate with

Drug Enforcement Administration agents and continued her trip to Colorado (III Tr. 81, 90–91, 135–142).

In Colorado, Elizabeth phoned Roberts at the direction of DEA agents and arranged to meet him at Stapleton Airport (III Tr. 144–145; IV Tr. 60). A surveillance was set up at the airport (IV Tr. 67). When Roberts arrived, he directed Elizabeth to his automobile. Once inside the car, she delivered the heroin to him. She then gave a prearranged signal, and DEA agents arrested Roberts and recovered the heroin (III Tr. 145; IV Tr. 69, 100–101, 114–115).

2. Petitioner was indicted together with Freeman and Roberts on narcotics conspiracy and importation charges. Petitioner's wife was granted use immunity in exchange for her trial testimony and was named in the indictment as an unindicted co-conspirator.[2] Prior to trial petitioner moved to sever his case from that of Roberts and Freeman, asserting that the government planned to call his wife as a witness in the joint trial and that he had not consented to his wife's giving testimony adverse to him (A. 8–9).

At the hearing on his motion to sever, petitioner contended, on the basis of the common-law privilege permitting one spouse to bar the other from giving adverse testimony, that he was entitled to prevent Elizabeth from testifying at his trial (A. 27). The district court denied the motion to sever and ruled that Elizabeth could testify against petitioner. The court ordered, however, that all confidential communications between petitioner and his wife were to be excluded (A. 29).

At trial petitioner unsuccessfully renewed his objection to his wife's being called as a witness (A. 34–35). Elizabeth Trammel was a key government witness, the

[2]She testified that she was advised that if she cooperated with the government she might be charged only with a misdemeanor and receive probation (I Tr. 22). In fact, we are advised, she was not prosecuted for her role in the conspiracy.

case against petitioner resting almost exclusively on her testimony.

The court of appeals upheld the ruling of the district court permitting petitioner's wife to testify over his objection, principally on the ground that the privilege against adverse testimony by a spouse is inapplicable where the spouses jointly participated in the crimes charged.

SUMMARY OF ARGUMENT

1. Under Rule 501 of the Federal Rules of Evidence, all testimonial privileges, except as required by the Constitution, an Act of Congress, or rules prescribed by the Court, are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Testimonial privileges are exceptions to the general rule that the public has a right to every man's evidence, and they impede the search for truth in judicial proceedings. They should, therefore, be construed narrowly, being given no greater scope than is essential to serve the purposes for which they exist.

The present case concerns the public's right to evidence that petitioner's wife agreed to give in the trial of her husband for a criminal offense in which she admitted to having been a joint participant. All confidential communications between petitioner and his wife were excluded from her testimony, but petitioner nonetheless sought to assert a right to bar the testimony on the basis of a common-law privilege barring all adverse testimony by one spouse against the other without the consent of both.

The rationale for this privilege has shifted over the years. In recent years the principal purpose recognized for the privilege has been the preservation of marital harmony. *Hawkins* v. *United States*, 358 U.S. 74, 77 (1958). We submit that this purpose is properly served by a privilege (1) that is held by the witness-spouse

alone, permitting that spouse to decline to give adverse testimony against the other, and (2) that does not bar adverse spousal testimony concerning criminal activity in which the spouses have jointly participated. Under a privilege with either of these limitations, the testimony at issue in this case is admissible.[3]

2. In *Hawkins* v. *United States*, *supra*, this Court rejected the government's argument that the spousal privilege should belong to the witness-spouse alone, but it did not "foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.' " 358 U.S. at 79. We believe that reason and experience dictate overruling *Hawkins* on this issue.

The contours of the marital privilege should be shaped in such a manner as to strike the best balance between the competing societal interests of preserving the harmony of marriages and securing accurate resolution of judicial proceedings. While the goal of marital harmony might properly be given overriding weight when there exists meaningful marital harmony to be preserved and when the giving of adverse spousal testimony is likely to be the occasion for significant disruption of that harmony, the privilege is unjustified in cases where the giving of adverse testimony by the spouse of the accused is not likely to work serious injury to the marriage.

Since it would be impractical as well as unseemly, in our view, for the trial courts to make case-by-case determinations of the "worth" of particular marriages, the Court's task is to establish such general rules for the application of the privilege as are most likely to achieve the best balance between the competing interests. Be-

[3]Seventeen states recognize no privilege on the part of either spouse to withhold testimony in a criminal case, except insofar as the testimony may concern confidential marital communications. See Appendix, *infra*, Table No. 1. We do not here ask the Court to consider total abolition of the common law testimonial privilege, since it is unnecessary to go that far in order to sustain the judgment of the court of appeals.

cause the accused will almost always, as a matter of pure self-interest, seek to bar adverse spousal testimony regardless of any effect such testimony might have on marital harmony, the rule of *Hawkins* is almost entirely ineffectual as a means for striking a balance, operating instead to override the societal interest in just trial outcomes in every case. On the other hand, when one spouse is willing to give testimony adverse to the other in a criminal case, although having the right to withhold such testimony, that will often be a strong indication that the testimony is not likely to so injure the marriage as to justify its exclusion. For that reason, we urge the Court to locate the power to withhold adverse testimony in the witness-spouse rather than in the accused.

In many cases, indeed, permitting the accused to block adverse testimony that his or her spouse is willing to give might, in itself, be a cause of dissension in the marriage. Equally important, in cases like the present one, in which the spouse who agrees to testify is an admitted joint participant in the offense charged, vesting the privilege in the accused could work a serious injustice. By giving such testimony, a spouse might be able to secure more lenient treatment by the prosecutor in his or her own case. It is unfair to permit the other spouse—particularly where that spouse is the more culpable—to deprive the witness-spouse of this option and thereby subject him or her to greater criminal liability than he or she would otherwise suffer, while the defendant-spouse escapes punishment by suppressing the other's testimony.

In the present case, petitioner's wife chose to cooperate with the prosecution, including giving testimony against petitioner, thereby avoiding indictment for her role in the conspiracy charged. There is little basis in reason, experience, or the record in this case to suggest that marital harmony might have been materially advanced had petitioner been able to deny her that choice. On the other hand, conferring the privilege upon him

would almost surely enable petitioner to escape conviction despite his guilt, since the evidence of his participation in the conspiracy to import heroin derives almost entirely from the testimony of his wife.

3. Even were the Court otherwise inclined to leave the rule of *Hawkins* intact, it should not sustain the privilege claimed by petitioner in the circumstances of this case. The policy of preserving marital harmony and thereby advancing society's interest in protecting the institution of marriage is seriously undercut when the spouses have been joint participants in crime. A privilege that recognizes no exception for such cases permits one spouse to induce the other to give aid to a criminal enterprise, free of the fear that this assistant could later give adverse testimony. Society's interest in protecting the harmony of marriages is not advanced in any desirable way by providing an incentive for recruiting one's spouse into criminal activity. Such a privilege permits an abuse of the very relationship the privilege is designed to protect.

This argument accords with the treatment of other privileges—such as the lawyer-client privilege—for which exceptions are made where the protected relationship is used for criminal purposes. See, *e.g.*, *Clark* v. *United States*, 289 U.S. 1, 15 (1933). Reason and experience dictate that the privilege against adverse spousal testimony should not operate to bar the testimony of a spouse concerning criminal activity in which it is reliably determined that the spouses have been joint participants.

ARGUMENT

A DEFENDANT SHOULD NOT BE PERMITTED TO PREVENT HIS OR HER SPOUSE FROM GIVING ADVERSE TESTIMONY IF THE SPOUSE IS WILLING TO TESTIFY OR IF THE SPOUSES ARE JOINT PARTICIPANTS IN THE OFFENSE CHARGED

A. INTRODUCTION

1. *This Court is free to modify common-law privileges in the light of reason and experience*

Under Rule 501 of the Federal Rules of Evidence, all testimonial privileges, except as required by the Constitution, an Act of Congress, or rules prescribed by this Court, are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The language of Rule 501 is taken from former Rule 26, Fed. R. Crim. P., which previously governed the admissibility of evidence in federal courts, including the application of the common-law privileges.[4] In enacting Rule 501, Congress expressed its intent that the courts continue to carry out their traditional responsibility for development of the law of testimonial privileges through the adjudication of particular cases.[5]

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[4] The language of Fed. R. Crim. P. 26 (1971 ed.) was, in turn, taken from the decision in *Wolfle* v. *United States*, 291 U.S. 7, 12 (1934), in which this Court stated:

> [T]he rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.

[5] Congress rejected the treatment of privileges in Article V as drafted by the Advisory Committee on Rules of Evidence. Fed. R. Evid. 501 replaces the Committee's set of 13 rules defining nine specific non-constitutional privileges and excluding all other privileges except those designated by federal statute. See Proposed Fed. R. Evid. 501-513, 56 F.R.D. 183, 230-261 (1973); S. Rep. No. 93-1277, 93d Cong., 2d Sess. 11-13 (1974); H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 8-9 (1973). The proposed rules included a "Husband-Wife Privilege," which, with certain exceptions, would have empowered an "accused in a criminal proceeding * * * to prevent his spouse from testifying against him." Proposed Fed. R. Evid. 505, 56 F.R.D. at 244-245.

Thus, as Congressman Hungate, the principal sponsor of the Rules of Evidence in the House, explained during floor debate:

> Rule 501 is not intended to freeze the law of privilege as it now exists. The phrase "governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience," is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.

120 Cong. Rec. 40891 (1974).[6]

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[6]The amicus Michigan Bar Association Standing Committee on Civil Procedure contends (Br. 20–25) that this Court should not exercise its power to modify common-law privileges through its decisions because Congress has, in 28 U.S.C. 2076, restricted this Court's exercise of its *rulemaking* power respecting privileges by providing that any amendment to the Federal Rules of Evidence proposed by the Court "creating, abolishing, or modifying a privilege" shall not be effective unless "approved by act of Congress." This contention is insubstantial. It makes Section 2076, which was adopted contemporaneously with the Federal Rules of Evidence, flatly inconsistent with the grant by Rule 501 of the power to the federal courts to continue the common-law evolution of the federal law of privileges "in the light of reason and experience," and it overlooks the clear indication in the legislative history of Rule 501 that Congress fully expected the federal courts, in federal question cases and criminal proceedings, to continue to oversee the development of the common law respecting privileges in the adversarial context of particular adjudications. S. Rep. No. 93-1277, 93d Cong., 2d Sess. 11 (1974); H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 8 (1973); 120 Cong. Rec. 40891 (1974) (remarks of Rep. Hungate). Because Congress has the power to amend Rule 501 whenever it wishes—and thereby to overrule any change in common-law privileges made in court decisions with which it disagrees—there is no merit to the further contention of amicus (Br. 22–23) that if this Court declines to forgo use of its traditional power to shape the common law in the matter of privileges, it will thereby "cheat" Congress out of its "say" in the matter.

2. Testimonial privileges should be narrowly construed

One common-law principle affecting the treatment of privileges is the maxim—repeatedly reaffirmed by this Court—that the public has a right to every man's evidence. See, *e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972); *United States* v. *Bryan*, 339 U.S. 323, 331 (1950); 8 J. Wigmore, *Evidence* §2192 (McNaughton rev. 1961). Exceptions to this general principle are tolerable, as Mr. Justice Frankfurter observed, "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (dissenting opinion). See also *United States* v. *Bryan*, *supra*, 339 U.S. at 331.

Where such exceptions are recognized, this Court has indicated that they should not be "expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). See also *Herbert* v. *Lando*, No. 77-1105 (April 18, 1979), slip op. 20–21; *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). Accordingly, general rules of exclusion are not automatically applied in all circumstances; rather, courts inquire whether application of the rule will promote its objectives sufficiently to justify the substantial cost to society of excluding probative evidence. This Court, for example, has substituted for automatic exclusion of evidence seized in violation of Fourth Amendment rights a balancing test in which deterrence of official misconduct and the degree of disruption of proceedings are weighed. See, *e.g.*, *United States* v. *Janis*, 428 U.S. 433 (1976); *Stone* v. *Powell*, 428 U.S. 465, 488 (1976); *United States* v. *Calandra*, 414 U.S. 338, 349–352 (1974); *Walder* v. *United States*, 347 U.S. 62 (1954).

The present case concerns the public's right to evidence that a wife has agreed to give in the trial of her

husband for a criminal offense in which she admits to having been a joint participant. Because the witness had been granted immunity against the use of her testimony in a criminal proceeding against her and because the trial judge had directed that testimony concerning confidential communications between her husband and herself be excluded, the only basis for excluding her evidence was the objection of petitioner, resting on a common-law privilege to bar all adverse testimony by his spouse.

As we show below, this privilege is an ancient one but one that has undergone changes over the years, all of them in the form of exceptions to, or narrowings of the privilege, to assure that the search for truth is impeded only where some other public good plainly demands it. As we also show, reason and experience suggest that the policy ostensibly served by the privilege claimed by petitioner in this case would be better served by a privilege (1) that is held by the witness-spouse alone, permitting that spouse to decline to give adverse testimony against the other, and (2) that does not bar adverse spousal testimony concerning criminal activity in which the spouses have jointly participated. Under a privilege with either of these limitations, the testimony at issue in this case is admissible.

3. *The policy underlying the modern privilege is the protection of marital harmony*

The privilege against adverse spousal testimony was born of a generally held repugnance to condemning a man by the testimony of one "who lived under his roof, shared the secrets of his domestic life, depended on him for sustenance and [was] almost numbered among his chattels." 8 Wigmore, *supra*, §2227, at 212.[7] At a time

[7]This privilege—sometimes referred to as the "anti-marital facts" privilege (8 Wigmore, *supra*, §2227, at 210)—is distinct from the privilege, developed somewhat later, for confidential communications between a husband and wife. *Id.*, §§2333–2334, at 644–647. See also *Blau* v. *United States*, 340 U.S. 332 (1951). The communications privilege does not bar all testimony by one spouse against another, but, unlike the privilege against adverse spousal testimony, it applies even in proceedings that take place after the spouses have divorced (so long as the communications at issue occurred during the marriage), and it applies even if the testimony is not adverse. 8 Wigmore, *supra*, §2334, at 646.

when the offense of petit treason by a wife—violence against the head of a household— was still recognized, it would have seemed inconsistent for the law to allow a "testimonial betrayal" that came close to petit treason and virtually permitted a wife to cause her husband's death. *Ibid.*

By the time of Lord Coke, the privilege was perceived as an incident of the disqualification of all spousal testimony. *Ibid.* The disqualification was based on the common-law rule of incompetency that excluded the testimony of interested parties to a lawsuit, both barring testimony by a party in his own behalf, and conferring on him a privilege not to be a witness against his own cause. This rule, reinforced by the common-law belief that husband and wife were legally one person, resulted in the general disqualification of spouses from testifying for or against one another.[8]

Always the subject of widespread criticism, the rule of disqualification was gradually overturned. The disqualification of the party was abandoned in the course of the 19th century, and the disqualification of favorable spousal testimony was subsequently discarded as well. *Funk* v. *United States*, 290 U.S. 371 (1933). The rule prohibiting adverse testimony by a spouse survived, however, even after the concepts upon which it was historically based had been rejected. See *Hawkins* v. *United States*, 358 U.S. 74, 81 (1958) (Stewart, J., con-

[8]Blackstone wrote that admitting husband and wife as witnesses against each other would contradict the maxim "nemo tenetur seipsum accusare"—"no one should be held to accuse himself." 1 W. Blackstone, *Commentaries* *443.

curring), although, as we show below (pages 23–25, *infra*), it has, in the majority of states, either been substantially modified or abolished in favor of a privilege protecting only confidential communications between spouses.

The predominant modern-day justification for the privilege, whatever its form, is that it preserves marital harmony.[9] This was, thus, the ground on which this Court, in *Hawkins* v. *United States*, *supra*, upheld the application of the privilege in a criminal proceeding. In *Hawkins*, the defendant's wife testified over his objection in a prosecution under the Mann Act, 18 U.S.C. 2421. The Court identified as the basis for the privilege against adverse spousal testimony the "belief that such a policy [is] necessary to foster family peace, not only for the benefit of husband, wife and children, but for

[9] Critics of the privilege argue, however, that the stability of the family does not depend upon the inability of spouses to testify against one another and that the goal of preserving the family therefore provides an inadequate basis for excluding potentially valuable evidence. They also point out the inconsistency of providing the privilege to spouses while denying it to parents, children, and siblings, since the peace of the family is no less dependent on the harmoniousness of those relationships. Finally—and this appears to be Wigmore's principal objection—they maintain that it is unjust and illogical to permit the wrongdoer to prevent his victim from obtaining redress in the name of preserving his own marital peace. 8 Wigmore, *supra*, §2228, at 216–217. See also, 5 J. Bentham, *Rationale of Judicial Evidence* 332, 339–345 (1827); Note, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 Nw. U. L. Rev. 208, 230 (1961); Hines, *Privileged Testimony of Husband and Wife in California*, 19 Calif. L. Rev. 390, 408 (1931); Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675 (1929); 1 E. Livingston, *The Complete Works of Edward Livingston on Criminal Jurisprudence* 450–459 (1968 Reprint); C. McCormick, *Evidence* §66, at 145–146 (2d ed. 1972) (footnote omitted) ("The privilege is an archaic survival of a mystical religious dogma and of a way of thinking about the marital relation that is today outmoded.").

the benefit of the public as well." 358 U.S. at 77. It concluded: "Such a belief has never been unreasonable and is not now." *Ibid.* See also *Wyatt* v. *United States*, 362 U.S. 525, 527 (1960); *Lutwak* v. *United States*, 344 U.S. 604, 615 (1953); *Stein* v. *Bowman*, 38 U.S. (13 Pet.) 209, 221 (1839). Although the privilege has been justified on other grounds,[10] the courts have not generally adopted them. By now it is clear that the privilege is to be construed in accordance with its purpose of protecting the family as a socially beneficial institution.

Thus, in *Lutwak* v. *United States*, *supra*, 344 U.S. at 615, this Court held that the privilege should not be applied where it would prevent the "wives" of sham marriages, entered into for the purpose of evading the immigration laws, from testifying against their "husbands," since society's interest in protecting "the sanc-

[10] It has been advanced as justification for the privilege that there exists a "natural repugnance" to compelling a wife or husband to be the means of the other's condemnation, and to exposing the culprit to the humiliation of being condemned by his spouse. See *Wyatt* v. *United States*, *supra*, 362 U.S. at 535 (dissenting opinion); 8 Wigmore, *supra*, §2228, at 217. A throwback to the days when the offense of petit treason was still recognized, this basis for the privilege is, as Wigmore asserts, "not more than a sentiment" and "does not posit any direct and practical consequence of evil"; the same argument could be made for "abolishing the office of spies in a war" (*ibid.*).

Amicus suggests (Am. Br. 35–36) that the privilege might have First Amendment underpinnings as an exercise of the right of marital privacy recognized in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The privacy right recognized in *Griswold*, however, concerned the right to be free of governmental intrusion when making decisions on intimate matters—such as contraception—that affect the marital relationship. While a connection may be discerned between that right and a privilege against compelled testimony respecting communications between spouses on certain subjects, no such connection is apparent between that privacy right and a general privilege permitting an accused to bar testimony by his or her spouse respecting criminal conduct, such as participation in a conspiracy to import heroin.

tity and tranquility of the marital relationship" is not advanced by protecting relationships entered into by those who had no intent of establishing a true marital relationship. For different reasons, we submit that the policy of protecting the marital relationship is not sufficiently served by barring the testimony given by petitioner's wife in this case to justify the costs incurred.

B. A Proper Accommodation Of The Competing Interests of Marital Harmony And Accurate Trial Outcomes Is Best Achieved By Vesting The Privilege To Withhold Testimony In The Witness-Spouse

As the result in *Lutwak* suggests, the marital privilege is not an absolute one that must be given sway regardless of competing societal considerations. Indeed, even at common law the privilege against adverse testimony by a spouse was not absolute. An exception was very early recognized in prosecutions for crimes committed by one spouse against the other, on grounds that strict application of the rule would allow a husband to injure his wife in secrecy with complete impunity.[11]

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[11] See *Trial of Lord Audley*, 3 How. St. Tr. 401, 414 (1631), admitting such testimony "where the wife is the party grieved, and on whom the crime is committed." This Court recognized the exception in *Stein* v. *Bowman*, *supra*, 38 U.S. at 221; and in *Wyatt* v. *United States*, *supra*, it held that in a prosecution under the Mann Act, 18 U.S.C. 2421, in which the defendant's wife was the victim of the offense, she could even be compelled over her objection to testify against her husband. The exception for injuries to the spouse is commonly placed on the ground of necessity, that is, the unavailability of any other witness. Wigmore has argued that this notion of necessity "might commendably have been a broader one; the necessity of doing justice to other persons in general, when the spouse's testimony was indispensable, would have been at least as great." 8 Wigmore, *supra*, §2239, at 242.

This exception for "crimes against the other" was, in time, broadly interpreted to include crimes against children of the marriage,[12] crimes against a spouse's property,[13] adultery,[14] bigamy,[15] incest,[16] and abandonment.[17] Many of these exceptions have been codified in state statutes. Moreover, as we explain below (pages 23-25, *infra*), a majority of the states and the District of Columbia have modified the privilege in such a way as to make adverse spousal testimony other than that involving confidential communications admissible in criminal trials over the objection of the defendant-spouse.

In recent years, federal courts have expressly acknowledged the need to balance competing considerations in determining whether the privilege should be applied in a particular case. *United States* v. *Cameron*, 556 F.2d 752, 756 (5th Cir. 1977); *Ryan* v. *Commissioner*, 568 F.2d 531, 543 (7th Cir. 1977); *United States* v. *Allery*, 526 F.2d 1362, 1366-1367 (8th Cir. 1975). In discussing the related privilege protecting confidential communications between spouses, the Fifth Circuit, for example, has indicated that in deciding how—or whether—to apply the privilege, it will weigh "the

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[12] *United States* v. *Allery*, 526 F.2d 1362 (8th Cir. 1975); *Balltrip* v. *People*, 157 Colo. 108, 114, 401 P.2d 259, 263 (1965).

[13] *Herman* v. *United States*, 220 F.2d 219, 226 (4th Cir. 1955), cert. denied, 350 U.S. 971 (1956); *United States* v. *Graham*, 87 F.Supp. 237 (E.D. Mich. 1949); *In re Kellogg*, 41 Cal. App. 2d 833, 107 P.2d 964 (1940).

[14] *United States* v. *Ryno*, 130 F. Supp. 685 (S.D. Cal. 1955), aff'd on other grounds, 232 F.2d 581 (9th Cir. 1956); *State* v. *Bennett*, 31 Iowa 24 (1870).

[15] *Richardson* v. *State*, 103 Md. 112, 63 A. 317 (1906); *Hills* v. *State*, 61 Neb. 589, 85 N.W. 836 (1901).

[16] *State* v. *Shultz*, 177 Iowa 321, 158 N.W. 539 (1916).

[17] *United States* v. *Ryno*, *supra*; *State* v. *Bean*, 104 Mo. App. 255, 78 S.W. 640 (1904).

need for truth against the importance of the policy sought to be furthered by the privilege," considering "the likelihood that recognizing the privilege in the factual setting of [the] case will in fact further that policy, and, if so, [by] how much." *United States* v. *Mendoza*, 574 F.2d 1373, 1381 (5th Cir. 1978). Thus, the courts recognize that where the need for the evidence outweighs the likelihood that the policy of a privilege will be advanced, the privilege ought to give way.

The object of the marital privilege is to preserve marital harmony. It is indispensable to the accomplishment of this goal that there be some marital harmony to preserve; the societal cost of withholding probative evidence from the jury is simply not worth paying unless the spouse's testimony would create a significant peril to the marriage that is otherwise avoidable.

Of course, the probable effect of adverse spousal testimony on a particular marriage, as well as the damage its exclusion would do to the fact-finding process in a particular case, will vary substantially from case to case. We do not suggest, however, that the availability of the privilege should depend on a case by case judicial assessment of the "worth" of a particular marriage—an undertaking that would be not only difficult but unseemly. Rather, the Court should seek to fashion criteria of general application that will strike the best balance in the majority of cases between the competing social interests that are at stake.

The rule for which petitioner contends—vesting a power to exclude the testimony in the defendant-spouse—is in our view unduly costly to the goal of just trial outcomes and has no tendency to differentiate between instances in which there exists a meaningful degree of marital harmony to be preserved and those in which there does not. Under that rule, even if there is already an irreparable estrangement between the spouses, the defendant will almost always move to bar adverse spousal testimony as a matter of pure self-interest.

The better rule would vest the power to withhold adverse testimony in the witness-spouse. As a general proposition, the willingness or unwillingness of one spouse to testify against the other is a meaningful barometer of the degree to which marital harmony exists and merits protection despite the significant social costs that loss of the testimony would entail. When a spouse, having the right to withhold testimony, is nevertheless willing to testify, suppression of that testimony is not likely to advance significantly the policy underlying the privilege. See C. McCormick, *Evidence* §66, at 145 (2d ed. 1972); Comment, *Federal Rules of Evidence and the Law of Privileges*, 15 Wayne L. Rev. 1287, 1336 (1969).[18]

We recognize that this argument was rejected by this Court in *Hawkins* v. *United States*, *supra*, but we believe it is a question appropriate for reconsideration. This Court took care to observe in *Hawkins* that its decision did not "foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.' " 358 U.S. at 79.

When the spouse of a defendant charged with a criminal offense knows of facts suggesting that the defendant has in fact committed the offense, he or she may well wish not to testify against the defendant-spouse, whether out of feelings of loyalty to the spouse

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[18] Also, as one commentator has pointed out, the "repugnancy" rationale for the privilege (see page 12, *supra*) is at least weaker in cases in which a defendant seeks to bar the voluntary testimony of his or her spouse: "If 'repugnancy' is the rationale, it applies primarily to the spectre of compelling a spouse to condemn his or her mate on pain of contempt; however, if the witness spouse chooses voluntarily to testify, whether out of a sense of duty to tell the truth or out of ill feeling toward the accused, society will less likely be offended." Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 Calif. L. Rev. 1353, 1384–1385 (1973) (footnote omitted).

or a desire not to risk endangering the marital relationship. On the other hand, the non-defendant spouse may have no affection for the defendant-spouse, may believe there is no marital relationship worth saving, or may think that the best course for the defendant-spouse, and for the marriage in the long run, is for the truth to come out and the defendant-spouse to accept the consequences of his or her conduct. At least as between the defendant-spouse and the witness-spouse, the latter is the better judge of these questions. For as one commentator has observed:

> If the rationale for the privilege is one of avoiding marital dissension, then the only spouse able to make a decision to testify on the basis of whether the marriage is worth saving is the *witness* spouse; the accused is understandably unlikely to be able to put aside his or her strong personal interest in suppressing adverse testimony, and would be likely to invoke the privilege regardless of marital considerations.

Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 Calif. L. Rev. 1353, 1384 (1973) (emphasis in original).

Permitting one spouse to prevent the other from testifying might even, in some cases, prove at least as great a source of dissension in the marriage as permitting the witness-spouse to testify over the defendant's objection. Moreover, in cases such as the present one, in which both spouses are involved in the criminal conduct to some degree, permitting the defendant-spouse to invoke the privilege could work a grave injustice.

When, for example, a wife is in danger of losing her freedom if she refuses to cooperate with the prosecution, while her husband is free to suppress any testimony she might give against him, the price for indulging such a power in the husband is paid by both the wife and the judicial process. This is an especially undesirable result where her husband is responsible for

having brought her to this unfortunate pass in the first place, and where her willingness to become a government witness may signify a desire to forgo the criminal life. Yet, though an accused may avoid punishment simply by invoking the privilege, his spouse is powerless without his cooperation to achieve the same result by refusing to invoke it and assisting the government.[19] Indeed, the tables are completely turned; instead of the witness-spouse having the option of earning her freedom by aiding in the conviction of her husband, the accused is in a position to subject her to punishment, while avoiding it himself. Since the accused is ordinarily the more culpable, it is an intolerable consequence of the privilege that he should go free while his spouse is punished. Such a result would hardly be conducive to the maintenence of marital harmony. Yet that is a result to which the privilege claimed by petitioner can lead.[20]

It has been suggested that adverse spousal testimony by one who is himself subject to prosecution cannot be regarded as truly voluntary because of the leverage possessed by the government in its exercise of prosecutorial discretion, and that the spouse's willingness to

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[19] It is unrealistic to expect the government to award consideration for the mere willingness to testify. Such a policy would quickly degenerate into a charade in which the witness-spouse would agree to testify knowing the accused would invoke the privilege.

[20] A related situation arises where the spouses are co-defendants and the wife wishes to exculpate herself by placing the blame on her husband. The privilege would presumably permit the husband to prevent her from testifying. This problem could be resolved by severing the defendants pursuant to Rule 14, Fed. R. Crim. P. (see Comment, *Marital Privileges and the Right to Testify*, 34 U. Chi. L. Rev. 196 (1966)); a severance, however, would deny a single jury the opportunity to apportion blame and would create a situation in which each spouse could conceivably escape punishment by shifting responsibility to the other.

testify cannot, therefore, be taken as an indication of his or her feelings toward the defendant-spouse. *Hawkins* v. *United States, supra*, 358 U.S. at 83 (Stewart, J., concurring); 2 *Weinstein's Evidence* ¶505[04], at 505–15 (1979).[21] This overstates the case, however, since the decision to testify is still voluntary, although it is presumably a result of weighing the interest in securing lenient treatment in return for testimony against any concern that may be felt about the possibility of damaging the marriage by giving testimony that could lead to the conviction of the defendant-spouse. But in any event, in these circumstances, as we have pointed out, denying the witness-spouse this option is manifestly unfair and may "inflame existing domestic differences" (*Hawkins* v. *United States, supra*, 358 U.S. at 79) just as easily as may permitting the witness-spouse to testify.[22]

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[21] This was the principal reason given in a memorandum by Edward W. Cleary, Reporter for the Advisory Committee on the Federal Rules of Evidence, for rejecting the suggestion by the Department of Justice that the witness-spouse be the sole holder of the privilege. *Rules of Evidence: Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 57–58 (1973). (Making the witness-spouse sole holder of the privilege was advocated by Senator McClellan as well as by the Department. *Id.* at 51.) As noted below (pages 24–25, *infra*), the recognition of a privilege in a defendant in a criminal proceeding to prevent his spouse from giving testimony against him, incorporated in Proposed Fed. R. Evid. 505 (56 F.R.D. at 244–245), reflects neither a majority rule among the states nor the rule adopted by the drafters of the Uniform Rules of Evidence.

[22] While it is clear in this case that Elizabeth Trammel was offered favorable treatment with regard to her own offense in exchange for cooperation in the prosecution of petitioner and his co-defendants, this appears to have been wholly independent of any motivation to overcome the marital privilege. The record does not suggest that she would have been treated any differently had she instead been the girl friend or a blood relative of

In sum, in deciding whether to adhere to the holding of *Hawkins* that the right to bar adverse spousal testimony rests with the defendant-spouse rather than the witness-spouse, the Court should consider several factors: (1) the greatly diminished likelihood when the witness-spouse has agreed to give adverse testimony that the policy of the privilege will be materially advanced, (2) the damage to the judicial process of exclusion of the testimony, and (3) the injustice to the witness-spouse of vesting in the defendant the power to destroy the witness-spouse's ability to reach a favorable arrangement with prosecutors in his or her own case.

At least two of these considerations support our position that the privilege should not apply in the instant case.[23] Elizabeth Trammel willingly testified against her husband, and that testimony was indispensable to the case against petitioner. Had it been excluded, it is doubtful that petitioner could have been brought to justice for his serious crimes. Because her testimony was a quid pro quo for lenient treatment of her own offense, the ironic result of a reversal in this case would be that future Elizabeth Trammels would be prevented by their husbands' power to invoke the marital privilege from

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petitioner, or simply his partner in crime. Indeed, as the record indicates, Janice Keenan, a government witness who was also an admitted participant in the conspiracy, received a similar grant of immunity in exchange for her testimony, even though she was only a "roommate" of one of the defendants (III Tr. 12–15, 18–20). We are advised that Janice Keenan, like petitioner, has not been prosecuted for her role in the conspiracy.

[23] It is unclear from the record what degree of marital harmony, if any, might have been put at risk by Elizabeth Trammel's testimony. Whether or not her agreement to testify in exchange for lenient treatment suggests that she judged the marriage either not worth saving or not likely to be endangered by her testimony, petitioner's invocation of the privilege certainly sheds no light whatsoever on the likely effect of his wife's testimony on the marriage.

protecting their own interests in avoiding severe punishment.

Recent trends in state law reflect a diminished willingness to allow a defendant in a criminal case to bar the adverse testimony of his or her spouse. In his concurrence in *Hawkins*, Mr. Justice Stewart noted that "[a]pparently some nineteen States have either abolished or substantially modified this privilege." 358 U.S. at 81 n.3. This figure was evidently based upon a 1952 article reviewing state law at that time.[24] Within a few years after *Hawkins*, this figure had risen to 22 states and the District of Columbia. See Note, *Spousal Testimony*, 28 Brooklyn L. Rev. 259, 293-295 (1962). Our survey of current state laws (see Appendix, *infra*) shows that 27 states and the District of Columbia now refuse to confer upon the defendant-spouse a power to bar adverse spousal testimony in a criminal case.[25] Not only does this figure represent a majority of the jurisidictions comprising the states and the District of Columbia; it also includes a substantial number of the highly populous states (*e.g.*, California, New York, Illinois, Ohio). The states that would not recognize petitioner's claim of privilege in fact contain more than 60% of the Nation's population (and presumably a similar proportion of its litigation).[26] In short, if the Court elects to perpetuate the *Hawkins* rule, it will be aligning the federal system with a declining minority position. For the reasons of policy that we have outlined above, it should decline to do so.

[24] Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 Va. L. Rev. 359 (1952).

[25] In its note to Proposed Fed. R. Evid. 505, the Advisory Committee observed that "[a]bout 30 jurisdictions recognize a privilege of an accused in a criminal case to prevent his or her spouse from testifying." 56 F.R.D. at 245. As the figures supplied above indicate, there are now no more than 24 such states (and in seven of those the bar to testimony is not, strictly speaking, a privilege in the defendant-spouse but a rule of incompetency that bars adverse testimony by one spouse against the other without respect to the wishes of either) (see Appendix, *infra*, Table Nos. 3, 4). It is noteworthy also that the Uniform Rules of Evidence, published in 1974, provide in Rule 501 that only those privileges created by constitution, statute, or rule shall be recognized; and in Rule 504 they replace the common-law spousal privilege with a privilege limited to protecting confidential communications between spouses.

C. The Policy of the Privilege is Not Served by Applying It Where the Spouses Are Joint Participants in the Offense Charged

Even if this Court declines to hold that the privilege against adverse spousal testimony does not apply where the witness-spouse is willing to testify, the testimony of petitioner's wife should be held admissible for the reason that the evidence indicated that she and the petitioner were joint participants in the conspiracy to import heroin charged in the indictment. In such circumstances, society's interest in preserving marital harmony is outweighed by the injury inflicted on the public by the use of the marital relationship for illicit purposes. As the Seventh Circuit observed, in reasoning adopted by the court of appeals in this case (A. 43):

> [The] goal [of preserving the family] does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness.

[26] The states rejecting such a privilege are identified in our survey (Appendix, *infra*, Table Nos. 1, 2). The population percentage approximation given above is based on Bureau of Census estimates of the population of the United States in 1976, broken down by states. Bureau of the Census, *Statistical Abstract of the United States* 11 (98th annual ed. 1977).

United States v. *Van Drunen*, 501 F.2d 1393, 1396 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). See also *Ryan* v. *Commissioner*, *supra*, 568 F.2d at 544. Plainly, society's interest in fostering harmony in marriages, which ordinarily may be thought to contribute to the rehabilitation of the defendant-spouse, is not well served by providing an incentive for recruiting one's spouse into criminal activity.[27] A privilege permitting co-conspirator spouses each to prevent testimony by the other concerning their joint criminal activity would tend to encourage abuse of the relationship that the privilege is designed to protect. Cf. *Wyatt* v. *United States*, *supra*, 362 U.S. at 527.

This analysis accords with exceptions to other privileges, where the privileged relationship is similarly abused. Thus, it has long been held that a client who uses his attorney to obtain guidance in the commission of a crime is not protected by the attorney-client privilege against his attorney's taking the stand to testify about their conversations. *Clark* v. *United States*, 289 U.S. 1, 15 (1933); *In re Doe*, 551 F.2d 899 (2d Cir. 1977); *Hyde Construction Co.* v. *Koehring Co.*, 455 F.2d 337, 342 (5th Cir. 1972); *United States* v. *Friedman*, 445 F.2d 1076, 1086 (9th Cir.), cert. denied, 404 U.S. 958 (1971). It has also been held that the privilege protecting confidential communications between husband and wife does not apply to communications in furtherance of criminal activity. See *United States* v. *Mendoza*, *supra*, 574 F.2d at 1379–1381; *United States* v. *Kahn*, 471 F.2d 191, 194 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973); *State* v. *Smith*, 384 A.2d 687, 693–694 (Me. 1978); *People* v. *Watkins*, 89 Misc. 2d 870, 393 N.Y.S.2d 283 (Sup. Ct. 1977); *Gill* v. *Commonwealth*, 374 S.W.2d 848, 851 (Ky. 1964); but see

[27] As Jeremy Bentham observed, the privilege would not only make "every man's house his castle," but it would aid in converting it into "a den of thieves." 5 *Rationale of Judicial Evidence* 340 (1827).

Smith v. *State*, 344 So.2d 915, 919 (Fla. Dist. Ct. App. 1977). The privilege against adverse testimony by a spouse, like other privileges, should "take[] flight if the relation is abused" (*Clark* v. *United States*, *supra*, 289 U.S. at 15), and the marital relation is clearly abused where the spouses jointly participate in crime.

An additional reason for recognizing this exception to the privilege against adverse spousal testimony is that it would prevent the injustice, discussed above (pages 20–21, *supra*), of permitting one spouse to escape conviction by suppressing the testimony of the other, while depriving the latter of the opportunity to seek more lenient treatment in exchange for full testimony concerning the joint criminal activity. The result of withdrawing the privilege in the case of criminal conspiracies in which spouses are joint participants would thus be to place spouses who wished to cooperate fully with the government on an equal footing with other members of the conspiracy in regard to the type of cooperation they could offer in return for favorable treatment of their own cases.

Allowance of an exception to the privilege in these circumstances would not resuscitate any argument that was rejected by this Court in *Hawkins*. Regardless whether, as amicus argues (Am. Br. 8–9), the wife who testified in *Hawkins* could have been regarded as occupying a position functionally equivalent to that of an unindicted co-conspirator like Elizabeth Trammel, the fact remains that the government raised no issue as to a co-conspirator exception in *Hawkins*, and the Court, accordingly, did not consider such an argument.[28] In

[28] For the same reason, petitioner is incorrect in suggesting (Br. 11 n.2, 14) that decisions of the Fifth, Eighth, and Ninth Circuits have rejected the co-conspirator exception. The issue was not raised in *United States* v. *Lilley*, 581 F.2d 182 (8th Cir. 1978); *Ivey* v. *United States*, 344 F.2d 770 (5th Cir. 1965); or *Peek* v. *United States*, 321 F.2d 934 (9th Cir. 1963). In *United States* v. *Williams*, 447 F.2d 894, 898 (5th Cir. 1971), the Fifth Circuit expressly declined to decide whether there is a co-

any event, as already noted, the Court made it clear that the decision in *Hawkins* did not foreclose modifications of the privilege recognized there.

Amicus contends (Am. Br. 12–16) that establishment of a co-conspirator exception to the privilege would lead to prosecutorial abuse in the form of naming spouses as co-conspirators on the basis of inadequate evidence. We do not suggest, however, that a bare allegation of conspiracy would be an adequate basis for recognizing such an exception; nor, on the other hand, would a formal allegation of conspiracy against both spouses even be necessary if a prosecutor could make an adequate offer of proof to the trial judge regarding the spouses' participation in joint criminal activity.[29] In any event, there was clearly no prosecutorial abuse in the present case. Petitioner's wife testified without objection in the pretrial hearing on petitioner's severance motion, and

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conspirator exception to the privilege against adverse spousal testimony.

[29] Arguments of amicus (Am. Br. 9–14) reveal, moreover, that this objection to the recognition of a co-conspirator exception to the privilege in fact applies to a number of evidentiary rules unique to conspiracy cases. Yet the courts have found ways of preventing unsupported conspiracy allegations from serving as a basis for admitting evidence that would be inadmissible absent such allegations. With regard to the admission of co-conspirator hearsay evidence, the courts have devised somewhat varying standards for the quantum of proof of the existence of a conspiracy and a particular defendant's participation in it that is required before such hearsay evidence will be admitted against that defendant. See, *e.g.*, *United States* v. *James*, 590 F.2d 575, 581 & n.4 (5th Cir. 1979) (en banc), cert. denied, Nos. 78–1412, 78–6369 & 78–6431 (June 4, 1979); *United States* v. *Santiago*, 582 F.2d 1128, 1133–1135 (7th Cir. 1978). See also cases holding that a prima facie showing establishing the criminal nature of an attorney-client communication must be made in order to defeat the attorney-client privilege. *Clark* v. *United States*, *supra*, 289 U.S. at 15; *United States* v. *Friedman*, *supra*, 445 F.2d at 1086; *United States* v. *Bob*, 106 F.2d 37, 40 (2d Cir.), cert. denied, 308 U.S. 589 (1939).

her testimony clearly established the substantial basis for her classification as a co-conspirator.

As explained above, Elizabeth Trammel's testimony was essential to the truth-seeking process in petitioner's trial. Petitioner sought to block that testimony by invoking a privilege designed to protect a relationship that the testimony would show he had exploited for criminal purposes. "Reason and experience" dictate that the privilege should be unavailable to a defendant-spouse in such a case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

SURVEY OF THE LAW IN THE FIFTY STATES AND THE DISTRICT OF COLUMBIA RESPECTING THE PRIVILEGE AGAINST ADVERSE SPOUSAL TESTIMONY IN CRIMINAL PROCEEDINGS

Table 1: Jurisdictions in Which the Privilege Has Been Abolished

State	*Source Defining the Existing Rule*
Arkansas	ARK. STAT. ANN. §28-1001, Rules 501 and 504 (Cum. Supp. 1977)[1]
Delaware	DEL. CODE ANN. tit. 11, §3502 (1975)
Florida	FLA. STAT. ANN. §§90.501, 90.504 (West Supp. 1979)
Illinois	ILL. ANN. STAT. ch. 38, §155-1 (Smith-Hurd Cum. Supp. 1979)
Indiana	IND. CODE ANN. §§34-1-14-4, 34-1-14-5 (Burns 1973)
Kansas	KAN. STAT. ANN. §§60-407, 60-428 (1976)

[1] Rule 501 provides that no privileges other than those provided by constitution or statute will be recognized; Rule 504 specifies the "Husband-Wife Privilege," which is limited to protection of confidential communications. Many jurisdictions have a communications privilege, but we have cited such provisions only where they represent the only privilege recognized with respect to spousal testimony; this, together with a general competency rule, indicates that the state does not recognize the different, broader privilege at issue in this case (see pages 12-13, note 7, *supra*).

The Arkansas rule, like virtually all of those listed in these tables, specifies certain exceptions (*e.g.*, the communications privilege does not apply in cases in which a spouse is charged with a crime against the person or property of the other spouse (Rule 504(d)). We have not classified the statutes according to such exceptions because that information is not material to the purpose of these tables.

State	*Source Defining the Existing Rule*
Maine	ME. REV. STAT. ANN., Maine Rules of Evidence, Rules 501, 504 (West Supp. 1978)
New Hampshire	N.H. REV. STAT. ANN. §516:27 (1974)
New York	N.Y. CRIM. PROC. LAW §60.10 (McKinney 1971); N.Y. CIV. PRAC. LAW §§4502, 4512 (McKinney 1963)
North Dakota	N.D. CENT. CODE, N.D. Rules of Evidence, Rules 501, 504 (Supp. 1977)
Ohio	OHIO REV. CODE ANN. §§2317.01, 2317.02 (Page 1954)
Oklahoma	OKLA. STAT. ANN. tit 12, §§2103, 2501, 2504 (West Cum. Supp. 1978–1979)
South Carolina	S.C. CODE §19–11–30 (1977)
South Dakota	S.D. COMPILED LAWS ANN. §§19–13–1, 19–13–12 through 19–13–15 (Supp. 1978)
Tennessee	TENN. CODE ANN. §40–2404 (1975)
Vermont	VT. STAT. ANN. tit. 12, §1605 (1973)
Wisconsin	WIS. STAT. ANN. §§905.01, 905.05 (West 1975)

Table 2: Jurisdictions in Which the Privilege Is Vested Solely in the Witness-Spouse

State	*Source Defining the Existing Rule*
Alabama	ALA. CODE tit. 12, §21–227 (1977)
Arizona	ARIZ. REV. STAT. ANN. §12–2231 (Supp. 1978)
California	CAL. EVID. CODE §§970–973 (West 1966)
Connecticut	CONN. GEN. STAT. ANN. §54–84 (West Cum. Supp. 1979)
District of Columbia	D.C. CODE §14–306 (1973)
Georgia	GA. CODE ANN. §38–1604 (1974)
Kentucky	KY. REV. STAT. §421.210 (Cum. Supp. 1978)
Louisiana	LA. REV. STAT. ANN. §15:461 (West 1967)
Maryland	MD. CTS. & JUD. PROC. CODE ANN. §§9–101, 9–106 (1974)
Massachusetts	MASS. ANN. LAWS ch. 233, §20 (Law. Co-op 1974)
Rhode Island	R.I. GEN. LAWS §12–17–10 (1970); see *State* v. *Kenyon*, 18 R.I. 217, 26 A. 199 (1893)

Table 3: Jurisdictions in Which the Privilege is Vested in Both Spouses or in the Defendant-Spouse Alone

State	*Source Defining the Existing Rule*
Alaska	ALASKA CRIM. PROC. RULES 26(b)(2) (Supp. Sept. 1968)
Colorado	COLO. REV. STAT. §13-90-107 (1974)
Idaho	IDAHO CODE §9-203 (Cum. Supp. 1978)
Michigan	MICH. COMP. LAWS §600.2162 (MICH. STAT. ANN. §27A.2162 (Callaghan 1976))
Minnesota	MINN. STAT. ANN. §595.02 (West Cum. Supp. 1978)
Missouri	MO. ANN. STAT. §546.260 (Vernon 1953)
Montana	MONT. REV. CODES ANN. §95-3011 (Cum. Supp. 1975)
Nebraska	NEB. REV. STAT. §27-505 (1975)
Nevada	NEV. REV. STAT. §49.295 (1977)
New Jersey	N.J. STAT. ANN. §2A:84A-17 (West 1976)
New Mexico	N.M. STAT. ANN. §20-4-505 (Cum. Supp. 1975)
Oregon	OR. REV. STAT. §44.040 (1977)
Utah	UTAH CODE ANN. §78-24-8 (1977)
Virginia	VA. CODE §19.2-271.2 (Cum. Supp. 1978)

State	*Source Defining the Existing Rule*
Washington	WASH. REV. CODE ANN. §5.60.060 (Supp. 1979)
West Virginia	W. VA. CODE §57-3-3 (1966)

Table 4: Jurisdictions in Which a Spouse is Not Competent To Testify Against the Other in a Criminal Proceeding

State	*Source Defining the Existing Rule*
Hawaii	HAW. REV. STAT. §621-18 (1968)
Iowa	IOWA CODE §622.7 (1979)
Mississippi	MISS. CODE ANN. §13-1-5 (Cum. Supp. 1978)
North Carolina	N.C. GEN. STAT. §8-57 (Cum. Supp. 1977)
Pennsylvania	PA. STAT. ANN. tit. 42, §§5913, 5915 (Purdon Supp. 1979)
Texas	TEX. CRIM. PRO. CODE ANN. art. 38.11 (Vernon 1979)
Wyoming	WYO. STAT. §1-12-104 (1977)